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Supreme Court, U.S.
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No. 08-212

IN THE

Supreme Court of the United States

EXXON MOBIL CORPORATION,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

SUPPLEMENTAL BRIEF OF RESPONDENT PETRO STAR INC.

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SUPPLEMENTAL BRIEF OF RESPONDENT PETRO STAR INC.

Pursuant to this Court's Rule 15.8, Respondent Petro Star Inc. submits this supplemental brief in response to the "Supplemental Brief of Petitioner," which wrongly contends that FERC's December 2, 2008 Order in a separate TAPS ratemaking proceeding supports a grant of review in this case. *See* Pet. Supp. Br. at 1 (citing *Order Accepting Compliance Filing*, 125 FERC ¶ 61,254 (Dec. 2, 2008)) (reproduced at Pet. Supp. Br. App. 1a-10a) ("December 2 Order"). Neither of Petitioner's two points has any merit.

First, Petitioner contends that the December 2 Order supposedly confirms that, had Congress made section 4412(b)(2) applicable to pending cases (instead of creating a different rule in section 4412(b)(1) for such cases), Petitioner would have received a retroactive award back to 1993. Pet. Supp. Br. 3. This differential treatment, according to Petitioner, violates its "'equal protection and due process'" rights and warrants this Court's review. *Id.* (citation omitted). Both the premise and the conclusion of this argument are wrong.

The conclusion is wrong, because even assuming (contrary to the reality) that the December 2 Order somehow confirmed that 4412(b)(2) would have produced a more favorable outcome here than 4412(b)(1), the Petition would still raise no certworthy issue. Congress's decision to adopt different retroactivity limits in section 4412 for pending and future TAPS ratemaking proceedings bears *only* on Petitioner's passing suggestion—made in a single paragraph of the Petition—that this differential treatment lacks a rational basis and therefore violates Petitioner's equal protection and due process rights. Pet. 17.

(Petitioner does not, and cannot, contend that the mere fact that Congress prescribes a different rule for pending cases than for future cases is inconsistent with *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871).) But Petitioner's argument that this distinction lacks a rational basis raises an issue that—as Respondent has explained—is utterly factbound, presents no circuit split, and lacks merit. *See* Br. in Opp. for Petro Star at 27-28.

Moreover, Petitioner's premise is demonstrably wrong: nothing in the December 2 Order suggests that section 4412(b)(2), were it applicable here, would have produced the outcome that Petitioner wanted, *i.e.*, 11 years of retroactive refunds back to 1993. Pet. Supp. Br. 3. On the contrary, FERC's December 2 Order *expressly* distinguishes the rate dispute at issue there from the FERC orders before this Court. Pet. Supp. Br. App. 9a-10a. The December 2 Order states:

> "[T]he ruling here does not mean that the 15-month limitation in section 4412(b)(2) can never come into play. For example, section 4412(b)(2) would apply in the case *of an 'unlawful order,' which apparently is the situation that motivated Congress to adopt the 15-month limitation* as reflected in the material cited .... [Footnote omitted] It follows that Congress, in addition to taking remedial action affecting a pending case through section 4412(b)(1), would also include a provision, section 4412(b)(2), designed to prevent a *recurrence* of the prospect of a *lengthy refund period caused by extended litigation over an unlawful order*."

Pet. Supp. Br. App. 9a-10a (emphases added). The footnote omitted from the above quotation further explicitly confirms that "the concern addressed by section 4412 was a retroactive valuation as in Opinion No. 481" *i.e.*, the principal FERC order at issue here. *Id.* at 9a n.11. Thus, even if FERC's December 2 Order is correct in its construction of section 4412(b)(2),[1] that Order, by its plain terms, cannot be construed to validate the "lengthy refund period" sought here.

On top of all this, even if the December 2 Order could be read to support Petitioner's cursory rational-basis argument, the Order cannot be said to settle the meaning of section 4412(b)(2), inasmuch as the Order remains subject to further proceedings, including a possible petition for rehearing before FERC and a possible petition for review in the D.C. Circuit.

Second, Petitioner contends that the December 2 Order's summary of *this* case in a footnote somehow establishes that Respondent is wrong in contending that section 4412(b)(1) did not direct or dictate a particular outcome. Pet. Supp. Br. 3-4. The suggestion is frivolous. The footnote sentence upon which Petitioner relies merely restates the bottom-line result that the FERC order in this case limited retroactivity to February 1, 2000, in accordance with section 4412(b)(1). Pet. Supp. Br. App. 9a n.11. That this was the ultimate ruling of FERC in this case is hardly a new fact, and the December 2 Order's unadorned restatement of that bare result does nothing

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[1] Respondent does not concede that the December 2 Order is correct. *See* Pet. Supp. Br. App. 2a n.4 (noting that Petro Star, among others, filed answers that were rejected by FERC).

to change the record or the ruling before this Court. As Respondent has explained, that record confirms that the parties in this case presented FERC with a variety of arguments concerning whether and to what extent payments should be made retroactive, and section 4412 did *not* purport to resolve all of those issues, so as to dictate a specific outcome; instead, it merely placed an outer limit on the extent of any retroactivity. Br. in Opp. for Petro Star 13-14. FERC's orders here explained at great length its reasons for resolving these issues as it did. Pet. App. 79a-88a, 183a-192a. Indeed, in rejecting the various equitable arguments against *any* retroactivity, FERC expressly noted that these arguments had more force in the pre-2000 time frame, so that section 4412(b)(1)'s February 2000 time limit actually "undermined" the anti-retroactivity argument. *Id.* at 81a. Nothing in the footnote sentence on which Petitioner relies even purports to (or could) alter the actual ruling and reasoning of FERC in this case.

CONCLUSION

For the foregoing reasons, and those stated in Respondent's brief in opposition, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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